



[Billing Code 6355-01-P]

CONSUMER PRODUCT SAFETY COMMISSION

[Docket No. CPSC-2011-0019]

16 CFR Part 1224

Revisions to Safety Standard for Portable Bed Rails

AGENCY: Consumer Product Safety Commission.

ACTION: Direct final rule.

SUMMARY: In February 2012, the U.S. Consumer Product Safety Commission (CPSC) issued a consumer product safety standard for portable bed rails. The standard incorporated by reference the applicable ASTM voluntary standard. We are publishing this direct final rule revising the CPSC's mandatory standard for portable bed rails to incorporate by reference the most recent version of the applicable ASTM standard.

DATES: The rule is effective on May 20, 2020, unless we receive significant adverse comment by [insert date 30 days after publication in the **FEDERAL REGISTER**]. If we receive timely significant adverse comments, we will publish notification in the *Federal Register*, withdrawing this direct final rule before its effective date. The incorporation by reference of the publication listed in this rule is approved by the Director of the Federal Register as of May 20, 2020.

ADDRESSES: You may submit comments, identified by Docket No. CPSC-2011-0019, by any of the following methods:

Electronic Submissions: Submit electronic comments to the Federal eRulemaking Portal at: <https://www.regulations.gov>. Follow the instructions for submitting comments. The CPSC does not accept comments submitted by electronic

mail (e-mail), except through www.regulations.gov. The CPSC encourages you to submit electronic comments by using the Federal eRulemaking Portal, as described above.

Written Submissions: Submit written submissions in the following way:

Mail/Hand delivery/Courier (for paper, disk, or CD-ROM submissions), preferably in five copies, to: Division of the Secretariat, Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504-7923.

Instructions: All submissions received must include the agency name and docket number for this proposed rulemaking. All comments received may be posted without change, including any personal identifiers, contact information, or other personal information provided, to: <https://www.regulations.gov>. Do not submit electronically confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public. If you wish to submit such information please submit it according to the instructions for written submissions.

Docket: For access to the docket to read background documents or comments received, go to: www.regulations.gov, and insert the docket number, CPSC-2011-0019, into the “Search” box, and follow the prompts.

FOR FURTHER INFORMATION CONTACT: Justin Jirgl, Compliance Officer, Office of Compliance and Field Operations, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814-4408; telephone: 301-504-7814; email: jjirgl@cpsc.gov.

SUPPLEMENTARY INFORMATION:

A. Background

1. Statutory Authority

Section 104(b)(1)(B) of the Consumer Product Safety Improvement Act (CPSIA), also known as the Danny Keysar Child Product Safety Notification Act, requires the Commission to promulgate consumer product safety standards for durable infant or toddler products. The law requires these standards to be “substantially the same as” applicable voluntary standards or more stringent than the voluntary standards if the Commission concludes that more stringent requirements would further reduce the risk of injury associated with the product.

The CPSIA also sets forth a process for updating CPSC’s durable infant or toddler standards when the voluntary standard upon which the CPSC standard was based is changed. Section 104(b)(4)(B) of the CPSIA provides that if an organization revises a standard that has been adopted, in whole or in part, as a consumer product safety standard under this subsection, it shall notify the Commission. In addition, the revised voluntary standard shall be considered to be a consumer product safety standard issued by the Commission under section 9 of the Consumer Product Safety Act (15 U.S.C. 2058), effective 180 days after the date on which the organization notifies the Commission (or such later date specified by the Commission in the Federal Register) unless, within 90 days after receiving that notice, the Commission notifies the organization that it has determined that the proposed revision does not improve the safety of the consumer product covered by the standard and that the Commission is retaining the existing consumer product safety standard.

2. The Portable Bed Rails Standard

On February 29, 2012, the Commission published a final rule issuing a mandatory standard for portable bed rails that incorporated by reference the standard in effect at that time, ASTM F2085-12, *Standard Consumer Specification for Portable Bed Rails*. 77 FR 12182. The ASTM standard for portable bed rails, ASTM F2085, *Standard Consumer Safety Specification for Portable Bed Rails*, applies to portable bed rails intended to be installed on an adult bed to prevent children from falling out of bed. These bed rails are intended for children who can get in and out of an adult bed unassisted (typically from 2 to 5 years of age). The standard was codified in the Commission's regulations at 16 CFR part 1224. Since publication of ASTM F2085-12, the current mandatory standard, ASTM has published one revision to ASTM F2085. ASTM F2085-19 was approved and published in November 2019. ASTM officially notified the Commission of this revision on November 22, 2019. The rule is incorporating ASTM F2085-19 as the mandatory standard.

B. Revisions to the ASTM Standard

Under section 104(b)(4)(B) of the CPSIA, unless the Commission determines that ASTM's revision of a voluntary standard that is a CPSC mandatory standard "does not improve the safety of the consumer product covered by the standard," the revised voluntary standard becomes the new mandatory standard. As discussed below, the Commission determines that the changes made in ASTM F2085-19 are neutral with respect to the safety of portable bed rails. Therefore, the Commission will allow the revised voluntary standard to become effective as a mandatory consumer product safety standard under the statute, effective May 20, 2020.

Differences between 16 CFR part 1224 and ASTM F2085-19

1. Reapproval Ballot

ASTM has published only one revision since the 2012 version. However, in May 2019, ASTM passed a reapproval ballot that made minor editorial revisions. This reapproved standard, ASTM F2085-12R19, included the following changes:

- In section, 1.7 “safety and health” was changed to “safety, health, and environmental.”
- Section 1.8 was added, stating that ASTM developed the standard in accordance with principles recognized by the World Trade Organization.
- Title of D3359 was updated from “Test Methods for Measure Adhesion by Tape Test” to “Test Methods for Rating Adhesion by Tape Test.”
- In subsection 9.3, “san” was changed to “sans” (for “sans serif”).

These changes all constitute minor editorial changes that do not have any impact on the safety of portable bedrails.

2. ASTM F2085-19

In November 2019, ASTM revised ASTM F2085-12R19. The resulting standard, ASTM F2085-19, includes the revisions listed above, as well as the changes below:

Non-substantive changes

- Two of the footnotes that were in Section 7, which provide explanatory information, such as how to measure thickness and the definition of the “indentation load,” have been moved to Notes within the text. Notes and footnotes are both considered to be nonmandatory text, for information only. ASTM’s form and style guidelines say that the distinction is that

footnotes are meant only for availability information (references, sources of supply) while notes are meant to provide additional (nonmandatory) information. Therefore, the ASTM editor moved the footnotes.

- Changes to unit expressions to bring the standard into accordance with ASTM form and style guidelines. For example, the revision added a repeater unit when expressing a range—1 in. to 2 in., instead of 1 to 2 in.

All of the non-substantive changes made in ASTM F2085–19 are neutral regarding safety for portable bed rails because they are editorial in nature.

Substantive change

The revisions that resulted in ASTM F2085–19 made one substantive change. This change affects test platform 2, which is a standard, twin size, innerspring, thick mattress covered by a sheet. The mattress was chosen to assess the influence of mattress thickness on bedrail performance. The sheet simulates common use patterns. ASTM F2085–12 specified the fiber content of the sheet as a white, 50/50 cotton/polyester blend. Reports from test labs have indicated difficulty sourcing a sheet that is marketed as a 50/50 blend and can be verified to be a 50/50 blend. Test labs requested that the sheet content change to 60/40 cotton/polyester, a blend more consistent with twin sheets on the consumer market, and therefore, easier to source. Before ASTM balloted this change, Engineering Sciences consulted with staff of the Laboratory Sciences Division of Mechanical Engineering (LSM), regarding the availability of 50/50 blend sheets. LSM staff concurred with the difficulty of sourcing a 50/50 blend sheet and reported no objections to the change.

CPSC does not anticipate that the change will affect safety. LSM staff notes that the standard continues to specify the thread count of the sheet as 100 to 300 threads per inch, and staff assesses the thread count range contributes more to friction than the specified change in fiber content. LSM staff has not observed any differences in testing qualitatively. Thus, staff believes that changing the sheet source from a 50/50 blend to a 60/40 blend would not affect how a technician performs the test or alter the results of the testing. Therefore, we conclude that this change is neutral regarding safety while increasing the ease of sourcing the test materials.

C. Incorporation by Reference

The Office of the Federal Register (OFR) has regulations concerning incorporation by reference. 1 CFR part 51. Under these regulations, agencies must discuss, in the preamble to the final rule, ways that the materials the agency incorporates by reference are reasonably available to interested persons and how interested parties can obtain the materials. In addition, the preamble to the final rule must summarize the material. 1 CFR 51.5(b).

In accordance with the OFR's requirements, section A of this preamble summarizes the major provisions of the ASTM F2085-19 standard that the Commission incorporates by reference into 16 CFR part 1224. The standard is reasonably available to interested parties, and interested parties may purchase a copy of the standard from ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428-2959 USA; phone: 610-832-9585; www.astm.org. A copy of the standard can also be inspected at CPSC's Division of the Secretariat, U.S. Consumer Product Safety

Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814, telephone 301-504-7923.

D. Certification

Section 14(a) of the CPSA requires that products subject to a consumer product safety rule under the CPSA, or to a similar rule, ban, standard, or regulation under any other act enforced by the Commission, be certified as complying with all applicable CPSC requirements. 15 U.S.C. 2063(a). Such certification must be based on a test of each product, or on a reasonable testing program, or, for children's products, on tests on a sufficient number of samples by a third party conformity assessment body accredited by the Commission to test according to the applicable requirements. As noted, standards issued under section 104(b)(1)(B) of the CPSIA are "consumer product safety standards." Thus, they are subject to the testing and certification requirements of section 14 of the CPSA.

Because portable bed rails are children's products, samples of these products must be tested by a third party conformity assessment body whose accreditation has been accepted by the Commission. These products also must comply with all other applicable CPSC requirements, such as the lead content requirements in section 101 of the CPSIA, the phthalates prohibitions in section 108 of the CPSIA and 16 CFR part 1307, the tracking label requirement in section 14(a)(5) of the CPSA, and the consumer registration form requirements in section 104(d) of the CPSIA.

E. Notice of Requirements

In accordance with section 14(a)(3)(B)(iv) of the CPSIA, the Commission has previously published a notice of requirements (NOR) for accreditation of third party

conformity assessment bodies for testing portable bed rails (77 FR 31102, May 24, 2012). The NOR provided the criteria and process for our acceptance of accreditation of third party conformity assessment bodies for testing portable bed rails to 16 CFR part 1224. The NORs for all mandatory standards for durable infant or toddler products are listed in the Commission’s rule, “Requirements Pertaining to Third Party Conformity Assessment Bodies,” codified at 16 CFR part 1112.

The revision to the test platform 2 provision (Section 7.1.2.1) changes the fiber content and color of the sheet covering the mattress, but does not require a new test or any changes to the test methodology. Testing laboratories that are currently CPSC-accepted, have demonstrated competence for testing in accordance with ASTM F2085-12, and will have the competence to source a new sheet and conduct the testing to the new standard under the revised standard ASTM F2085-19. Therefore, the Commission considers the existing CPSC-accepted laboratories for testing to ASTM F2085-12 to be capable of testing to ASTM F2085-19 as well. Accordingly, the existing NOR for this standard will remain in place, and CPSC-accepted third party conformity assessment bodies are expected in the normal course of renewing their accreditation to update the scope of the testing laboratories’ accreditation to reflect the revised standard.

F. Direct Final Rule Process

The Commission is issuing this rule as a direct final rule. Although the Administrative Procedure Act (APA) generally requires notice and comment rulemaking, section 553 of the APA provides an exception when the agency, for good cause, finds that notice and public procedure are “impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. 553(b)(B). The Commission concludes that when the

Commission updates a reference to an ASTM standard that the Commission has incorporated by reference under section 104(b) of the CPSIA, notice and comment are not necessary.

Under the process set out in section 104(b)(4)(B) of the CPSIA, when ASTM revises a standard that the Commission has previously incorporated by reference as a Commission standard for a durable infant or toddler product under section 104(b)(1)(b) of the CPSIA, that revision will become the new CPSC standard, unless the Commission determines that ASTM's revision does not improve the safety of the product. Thus, unless the Commission makes such a determination, the ASTM revision becomes CPSC's standard by operation of law. The Commission is allowing ASTM F2085-19 to become CPSC's new standard. The purpose of this direct final rule is merely to update the reference in the Code of Federal Regulations (CFR) so that it reflects accurately the version of the standard that takes effect by statute. The rule updates the reference in the CFR, but under the terms of the CPSIA, ASTM F2085-19 takes effect as the new CPSC standard for portable bedrails, even if the Commission did not issue this rule. Thus, public comment will not impact the substantive changes to the standard or the effect of the revised standard as a consumer product safety standard under section 104(b) of the CPSIA. Under these circumstances, notice and comment are not necessary. In Recommendation 95-4, the Administrative Conference of the United States (ACUS) endorsed direct final rulemaking as an appropriate procedure to expedite promulgating rules that are noncontroversial and that are not expected to generate significant adverse comment. *See* 60 FR 43108 (August 18, 1995). ACUS recommended that agencies use the direct final rule process when they act under the "unnecessary" prong of the good

cause exemption in 5 U.S.C. 553(b)(B). Consistent with the ACUS recommendation, the Commission is publishing this rule as a direct final rule because we do not expect any significant adverse comments.

Unless we receive a significant adverse comment within 30 days, the rule will become effective on May 20, 2020. In accordance with ACUS's recommendation, the Commission considers a significant adverse comment to be one where the commenter explains why the rule would be inappropriate, including an assertion challenging the rule's underlying premise or approach, or a claim that the rule would be ineffective or unacceptable without change. As noted, this rule merely updates a reference in the CFR to reflect a change that occurs by statute.

Should the Commission receive a significant adverse comment, the Commission would withdraw this direct final rule. Depending on the comments and other circumstances, the Commission may then incorporate the adverse comment into a subsequent direct final rule or publish a notice of proposed rulemaking, providing an opportunity for public comment.

G. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires that agencies review proposed and final rules for their potential economic impact on small entities, including small businesses, and prepare regulatory flexibility analyses. 5 U.S.C. 603 and 604. The RFA applies to any rule that is subject to notice and comment procedures under section 553 of the APA. *Id.* As explained, the Commission has determined that notice and comment are not necessary for this direct final rule. Thus, the RFA does not apply. We also note the limited nature of this document, which merely updates the incorporation by

reference to reflect the mandatory CPSC standard that takes effect under section 104 of the CPSIA.

H. Paperwork Reduction Act

The standard for portable bed rails contains information-collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The revisions made no changes to that section of the standard. Thus, the revisions will have no effect on the information-collection requirements related to the standard.

I. Environmental Considerations

The Commission’s regulations provide a categorical exclusion for the Commission’s rules from any requirement to prepare an environmental assessment or an environmental impact statement where they “have little or no potential for affecting the human environment.” 16 CFR 1021.5(c)(2). This rule falls within the categorical exclusion, so no environmental assessment or environmental impact statement is required.

J. Preemption

Section 26(a) of the CPSA, 15 U.S.C. 2075(a), provides that where a consumer product safety standard is in effect and applies to a product, no state or political subdivision of a state may either establish or continue in effect a requirement dealing with the same risk of injury unless the state requirement is identical to the federal standard. Section 26(c) of the CPSA also provides that states or political subdivisions of states may apply to the CPSC for an exemption from this preemption under certain circumstances. Section 104(b) of the CPSIA deems rules issued there under “consumer

product safety rules.” Therefore, once a rule issued under section 104 of the CPSIA takes effect, it will preempt in accordance with section 26(a) of the CPSA.

K. Effective Date

Under the procedure set forth in section 104(b)(4)(B) of the CPSIA, when a voluntary standard organization revises a standard upon which a consumer product safety standard was based, the revision becomes the CPSC standard within 180 days of notification to the Commission, unless the Commission determines that the revision does not improve the safety of the product, or the Commission sets a later date in the *Federal Register*. The Commission has not set a different effective date. Thus, in accordance with this provision, this rule takes effect 180 days after we received notification from ASTM of revision to this standard. As discussed in the preceding section, this is a direct final rule. Unless we receive a significant adverse comment within 30 days, the rule will become effective on May 20, 2020.

L. The Congressional Review Act

The Congressional Review Act (CRA; 5 U.S.C. 801-808) states that, before a rule may take effect, the agency issuing the rule must submit the rule, and certain related information, to each House of Congress and the Comptroller General. 5 U.S.C. 801(a)(1). The submission must indicate whether the rule is a “major rule.” The CRA states that the Office of Information and Regulatory Affairs (OIRA) determines whether a rule qualifies as a “major rule.” Pursuant to the CRA, this rule does not qualify as a “major rule,” as defined in 5 U.S.C. 804(2). To comply with the CRA, the Office of the General Counsel will submit the required information to each House of Congress and the Comptroller General.

List of Subjects in 16 CFR Part 1224

Consumer protection, Imports, Incorporation by reference, Infants and children, Law enforcement, Safety, Toys.

For the reasons stated above, the Commission amends 16 CFR part 1224 as follows:

PART 1224 – SAFETY STANDARD FOR PORTABLE BED RAILS

1. Revise the authority citation for part 1224 to read as follows:

Authority: Sec. 104, Pub. L. 110-314, 122 Stat. 3016 (15 U.S.C. 2056a); Sec 3, Pub. L. 112-28, 125 Stat. 273.

2. Revise § 1224.2 to read as follows:

§ 1224.2 Requirements for portable bed rails.

Each portable bed rail as defined in ASTM F2805-19, *Standard Consumer Safety Specification for Portable Bed Rails*, approved on November 1, 2019, must comply with all applicable provisions of ASTM F2805-19. The Director of the Federal Register approves the incorporation by reference listed in this section in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy of this ASTM standard from ASTM International, 100 Barr Harbor Drive, PO Box C700, West Conshohocken, PA 19428-2959 USA; phone: 610-832-9585; www.astm.org. You may inspect a copy at the Division of the Secretariat, U.S. Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814, telephone 301-504-7923, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email fedreg.legal@nara.gov, or go to: www.archives.gov/federal-register/cfr/ibr-locations.html.

Alberta E. Mills, Secretary

U.S. Consumer Product Safety Commission

[FR Doc. 2020-03106 Filed: 2/24/2020 8:45 am; Publication Date: 2/25/2020]